No. 10-____

IN THE

Supreme Court of the United States

JAMAL KIYEMBA, *et al.*,

Petitioners,

v.

BARACK H. OBAMA, *et al.*,

Respondents.

ON PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF *CERTIORARI*

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QUESTION PRESENTED

Boumediene v. Bush, 553 U.S. 723 (2008), held that aliens imprisoned at Guantánamo Bay enjoy the privilege of *habeas corpus*, and that "the judicial officer must have adequate authority to . . . issue appropriate orders for relief, including, if necessary, an order directing the prisoner's release." *Id.* at 787. Petitioners had been imprisoned for six years when the district judge held that they were non-enemy aliens who could not be transported to their home country of China, and directed that they be brought to his court room for the fashioning of release conditions. The court of appeals stayed and then reversed the order. While the case was pending on appeal, each Petitioner declined the opportunity to volunteer for "temporary relocation" to a remote Pacific island, with which he had no previous tie. The court of appeals held, in *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009) ("*Kiyemba I*"), and *Kiyemba v. Obama*, 605 F.3d 1046 (D.C. Cir. 2010) ("*Kiyemba III*"), that facts regarding release options were immaterial, and that the judicial power was confined to accepting without inspection the executive jailer's representations that it was attempting to fashion the time, conditions and locus of release through diplomatic means.

Thus the question presented by this case is whether a judicial officer of the United States, having jurisdiction of the *habeas corpus* petition of an alien transported by the executive to an offshore prison and there held without lawful basis, has any judicial power to direct the prisoner's release.

PARTIES TO THE PROCEEDING

The Petitioners are Khalid Ali, Sabir Osman, Abdul Sabour, Abdul Razakah, and Hammad Mehmet. [1]

The Respondents are Barack H. Obama, President of the United States, Robert M. Gates, Secretary of the Department of Defense, Rear Admiral David M. Thomas, Jr., Commander, Joint Task Force GTMO, Guantánamo Bay, Cuba, Colonel Bruce E. Vargo, Commander, Joint Detention Operations Group, Guantánamo Bay, Cuba.

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[1] Jamal Kiyemba, the next friend in the original *Kiyemba habeas* petition, has since been released.

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PRELIMINARY STATEMENT

This appeal concerns the judicial power. It involves non-criminal aliens, long ago conceded by the government not to be enemies, Joint Appendix ("JA") 426a-27a,[1] who have been imprisoned at Guantánamo Bay since 2002, and who "prevailed" in *habeas* before a district judge in 2008.

The district judge, learning that no avenue for release had ever been available to the five Uighur Petitioners (and others who were then held), directed in 2008 that they should be brought to his court room for the fashioning of release conditions. After all, "[a] basic consideration in *habeas corpus* practice is that the prisoner will be produced before the court." *See Johnson v. Eisentrager*, 339 U.S. 763, 778 (1950).

That was more than two years ago. When the court of appeals reversed in *Kiyemba I*, *see* Petitioners' Appendix ("Pet. App.") 18a, no appropriate avenue for release was available.[2] The panel majority's rationale, however, was that release options were irrelevant—with or without them, Petitioners' alien status left Article III courts powerless to direct a remedy. Pet. App. 21a-23a, 32a.

This Court granted *certiorari* to consider the question then framed: whether a court lacked power to di-

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[1] "JA" refers to the Joint Appendix filed with the *Kiyemba I* Petition for Writ of *Certiorari*.

[2] Facts regarding resettlement are partly subject to a protective order, and in light of the denial by the court of appeals of Petitioners' request for a remand to make a record, not well developed. The available information is set out in the Supplement to *Certiorari* Petition, filed under seal.

rect release when the only place available was the United States. *Kiyemba v. Obama*, 130 S. Ct. 458 (2009). Meanwhile the case was evolving: in the summer of 2009, all but one of the Uighur prisoners were offered "temporary relocation" to Palau (with which none had even a remote connection). Six accepted, but the five current Petitioners declined.[3] This Court then vacated *Kiyemba I* for reconsideration "in light of the new facts." *Kiyemba v. Obama*, 559 U.S. ---, 130 S. Ct. 1235 (2010) (*per curiam*).

The panel heard argument and issued *Kiyemba III*,[4] reinstating *Kiyemba I*. Once again the appellate court's rationale rendered academic the question whether a release order was necessary. Asserting that Petitioners had rejected three offers (an assertion that Petitioners contest, but can fairly address only on remand, *see* Sealed Supplement to *Certiorari* Petition), the court of appeals simply reinstated its earlier holding that the *habeas* court could only accept assurances that the Executive was attempting, through diplomatic means of its own choosing, to remedy the imprisonment. Pet. App. 4a.

Thus this petition presents a direct conflict between *Boumediene* and the law of the circuit: between the holding of *Boumediene*, 553 U.S. at 787, that "the judicial officer must have adequate authority to . . . issue

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[3] There is no current offer to be relocated to Palau.

[4] A separate controversy, concerning the court's power to require notice before a petitioner within its jurisdiction is removed, evolved from a motion brought by these petitioners (and others). The court of appeals ruled for the government. *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir.), *cert. denied*, --- S. Ct. --- (2009) ("*Kiyemba II*").

appropriate orders for relief, including, if necessary, an order directing the prisoner's release[,]" and the circuit's rule that the officer can do nothing more than accept assurances from the jailer, Pet. App. 32a. *Boumediene* held in 2008 that the judges were duty-bound promptly to dispose of cases; in 2009, the court of appeals barred them from ever issuing a *judicial* decree.[5] Under *Kiyemba III*'s reinstatement, this decision has rendered *judicial* relief categorically unavailable to the prevailing *habeas* petitioner. The only relief available is political.

At bottom, therefore, this petition concerns the most elemental aspect of the judicial power of the United States—the power of an Article III court to grant a remedy in a case or controversy over which it assuredly has jurisdiction. *Kiyemba III* delegated that quintessentially judicial function to the Executive branch, and in so doing abandoned a principle as old as *Hayburn's Case*: namely, that where the judicial branch has jurisdiction of a case or controversy, remedy is for that branch alone. The Court should grant the petition for a writ of *certiorari* to restore the judicial role that the court below abdicated.

OPINIONS BELOW

The district court's decision (Pet. App. 55a) is reported at *In re Guantánamo Bay Detainee Litig.*, 581 F. Supp. 2d 33 (D.D.C. 2008). The opinions of the court of appeals are reported at *Kiyemba v. Obama*, 555 F.3d

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[5] All current Guantánamo prisoners are aliens. As discussed below, the district court has no power to order foreign sovereigns to receive them.

1022 (D.C. Cir. 2009) (Pet. App. 18a), and *Kiyemba v. Obama*, 605 F.3d 1046 (D.C. Cir. 2010) (Pet. App. 1a).

JURISDICTION

The court of appeals entered judgment on September 9, 2010. Pet. App. 16a. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS OF LAW

Relevant constitutional and statutory provisions are set forth in Appendix F. Pet. App. 90a.

STATEMENT OF THE CASE

A. Factual And Procedural Background

Petitioners are refugees from China, seized in error during the Afghanistan war. Pet. App. 57a; JA 25a, 70a, 113a; 1601. They were not enemy aliens, nor participants in the September 11, 2001 attacks. *See* Pet. App. 19a-20a; *see also Parhat v. Gates*, 532 F.3d 834, 835-36 (D.C. Cir. 2008) (regarding former petitioner now in Bermuda).

Petitioners were sent to Guantánamo in approximately May, 2002. Pet. App. 58a; JA 28a-29a, 33a-34a, 164a-166a. Soon after, the U.S. military determined that each Petitioner was eligible for release. Pet. App. 58a; JA 488a. Efforts then began to resettle them abroad. Pet. App. 66a & n.2.

Petitioners cannot be repatriated to China or any country that would render them to China, because their avowed dissidence would likely result in torture or worse. JA 176a (citing State Department reports), 180a-181a (citing Department of Defense News Tran-

scripts and related news reports); *see also Parhat*, 532 F.3d at 838. The record shows extensive diplomatic resistance from China to resettlement abroad, and that by the time of the district court's ruling in 2008 the government had made failed efforts to obtain asylum from more than 100 countries. Pet. App. 65a-66a & n.2, 76a-77a.[6] The United States was the only place in which the district court could order release.

1. Petitioners' *Habeas* Cases

Each Petitioner sought *habeas* relief five years ago. JA 409, 444, 475, 510, 550, 582. At the government's urging, their imprisonment was prolonged for over three years by stays. JA 13, 68, 164, 348. *Habeas* relief was granted on October 7, 2008, and the district judge ordered that the prisoners be brought to his court room for the fashioning of release conditions. His order was immediately stayed by the court of appeals.

On February 18, 2009, the court of appeals reversed. Pet. App. 18a. Petitioners sought *certiorari* review. On October 20, 2009, this Court granted review. *Kiyemba v. Obama*, 130 S. Ct. 458 (2009).

2. Bermuda, Palau and Switzerland

While *certiorari* was pending, four Uighur prisoners were voluntarily resettled in Bermuda. They arrived in June 2009, and have lived in Bermuda freely and peacefully since then.

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[6] One release "offer," characterized by the court of appeals as "rejected," was *withdrawn* under pressure from another nation. *See* Supplement to *Certiorari* Petition at 3.

Also in the summer of 2009, the Republic of Palau extended an offer to twelve of the thirteen remaining Uighurs: it would "temporarily relocate" to Palau those who volunteered to come. Palau is a tiny island nation lying some 500 miles east of the Philippines. It has no connection to Petitioners. Six Uighurs accepted. The five petitioners declined the offer. Further information concerning the subject of resettlement is contained in the Sealed Supplement.

When this Court granted *certiorari* in October 2009, one of the remaining Uighurs had yet to receive an offer regarded as appropriate by the government. With the February 2010 deadline for the government's brief days away, he received an offer from Switzerland. He accepted, and has lived in freedom in Switzerland since then.

The government moved to dismiss the writ of *certiorari* as improvidently granted. The Court denied that motion and instead vacated *Kiyemba I*, and remanded to determine what further proceedings—either in the court of appeals or the district court—were "necessary and appropriate for the full and prompt disposition of the case in light of the new developments." *Kiyemba*, 130 S. Ct. at 1235. Petitioners requested remand to the district court to make a factual record regarding resettlement issues. On May 28, the court issued *Kiyemba III*, reinstating *Kiyemba I*, and denying the remand request because as a matter of law no relief was available. Pet. App. 2a-5a. The court denied Petitioners' request for *en banc* review on September 9, 2010. Pet. App. 16a-17a.

3. Post-*Certiorari* Legislation

While *certiorari* was pending, the Executive planned to resettle some of the Uighurs in Virginia. *See* Julian E. Barnes, *U.S. plans to accept several Chinese Muslims from Guantánamo*, L.A. TIMES, Apr. 24, 2009, *available at* http://articles.latimes.com/2009/apr/24/nation/na-gitmo-release24. Responding to highly-charged political opposition to this plan, the President shelved it.[7]

Instead, a rider was added to a defense funding bill, the Supplemental Appropriations Act, 2009, Pub. L. No. 111-32, 123 Stat. 1859. Enacted on June 24, 2009, it barred use of defense funding to release in the U.S. anyone detained at Guantánamo on the date of the bill's enactment. The bill expired later in 2009, but led to a number of separate enactments that purport to bar various agencies from spending funds during the applicable fiscal year to cause release of detainees or aliens who were present in Guantánamo on a specified day. Pet. App. 4a-5a.

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[7] *See* Massimo Calabresi & Michael Weisskopf, *The Fall of Greg Craig*, TIME, Nov. 19, 2009, *available at http://www.time.com/time/politics/article/0,8599,1940537,00.htm*; Michael Isikoff & Mark Hosenball, *Next Stop Nowhere*, NEWSWEEK, May 23, 2009, *available at* http://www.newsweek.com/id/199158; Peter Finn & Sandhya Somashekhar, *Obama Bows on Settling Detainees; Administration Gives Up on Bringing Cleared Inmates to U.S., Officials Say*, WASH. POST, June 12, 2009, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/06/11/AR2009061101210.html.

B. The Decisions Below

1. The district court's decision

Prior to the October 7, 2008 *habeas* hearing, the government conceded that the Petitioners were not enemy combatants, and declined to submit factual returns. JA 426a-427a. It contended that it had diligently pursued resettlement abroad for years, and that no such resettlement was in prospect. *See* Pet. App. 65a-66a & n.2, 76a-77a.

The district court requested a proffer of "the security risk to the United States should these people be permitted to live here." JA 468a. The government offered none. JA 470a. It "presented no reliable evidence that [Petitioners] would pose a threat to U.S. interests." Pet. App. 71a.

Acknowledging the sovereignty of the political branches over immigration matters, Pet. App. 70a, the court concluded, citing *Boumediene*, that the writ is "an indispensable mechanism for monitoring the separation of powers," and commanded that "the writ must be effective," Pet. App. 74a-75a (quoting *Boumediene*, 553 U.S. at 765, 783 (internal quotation marks omitted)). "The political branches may not simply dispense with these protections, thereby limiting the scope of *habeas* review by asserting that they are using their 'best efforts' to resettle the petitioners in another country." Pet. App. 76a (citing *Boumediene*, 553 U.S. at 765. ("[O]ur system of checks and balances is designed to preserve the fundamental right of liberty.")). Pet. App. 77a.

The court ordered that Petitioners appear on October 10, 2008, to begin the process of fashioning appro-

priate release conditions ("Release Order"). Pet. App. 79a-80a.

2. ***Kiyemba I***

The panel majority reconfigured Petitioners' *habeas* petitions into requests for judicially imposed refugee status and reversed. The majority rested chiefly on *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953) and *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950), and held that the district court erred because it "cited no statute or treaty authorizing its order" and "spoke only generally" of the Constitution. Pet. App. 25a. "Not every violation of a right yields a remedy, even when the right is constitutional," the majority said, citing sovereign immunity and political question decisions. Pet. App. 27a.

The majority held that the Fifth Amendment's Due Process Clause "does not apply to aliens without property or presence in the sovereign territory of the United States." Pet. App. 25a-26a. The majority cited its own pre-*Boumediene* decisions and this Court's decisions in *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990); and *Eisentrager*, 339 U.S. at 783-84.

This analysis, wrote Circuit Judge Rogers, was "not faithful to *Boumediene*" (in which the petitioners had also been aliens). Pet. App. 39a. The majority "recast the traditional inquiry of a *habeas* court from whether the Executive has shown that the detention of the petitioners is lawful to whether the petitioners can show that the *habeas* court is 'expressly authorized' to order aliens brought into the United States," and "conflate[d] the power of the Executive to classify an alien as 'ad-

mitted' within the meaning of the immigration statutes, and the power of the *habeas* court to allow an alien physically into the country." Pet. App. 49a-50a. Judge Rogers would have remanded to permit Respondents a further opportunity to show that the "immigration laws . . . form an alternate basis for detention." Pet. App. 39a.

3. *Kiyemba III*

In *Kiyemba III*, the court held that a factual determination concerning release options was unnecessary because, regardless of the existence or appropriateness of resettlement options, Petitioners "would have no right to be released into the United States." Pet. App. 4a. Relying on the core of its original opinion that the political branches have exclusive authority over the nation's borders, the court concluded that "it is for the political branches, not the courts, to determine whether a foreign country is appropriate for resettlement." *Id.* The court also thought that recent enactments by Congress conclusively barred the *habeas* release remedy. *Id.* at 4a-5a. It reinstated both the original *Kiyemba* judgment and its opinion, modifying the latter slightly to account for the latest developments in the case but leaving the core decision intact.

REASONS FOR GRANTING THE PETITION

A. The Decision Below Unconstitutionally Delegates the Judicial Power to the Executive Branch.

1. The Constitution vests the judicial power exclusively in the judicial branch.

Article III vests in the judicial branch the "judicial Power of the United States." U.S. CONST. art. III, § 1. Giving remedies in cases or controversies of which courts have jurisdiction has always been an essential attribute of the judicial power. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995); *Gordon v. United States*, 117 U.S. 697 (1864, reported 1885); *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872); *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792). The Judiciary may not be made beholden to the political branches for the exercise of that power. *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792).

As Justice Scalia explored in detail in *Plaut*, 514 U.S. at 219-24, the Framers, concerned that democratic majorities could undo private judgments, protected the power to decide cases from interference by the political branches. In the eighteenth century, populist legislatures and assemblies regularly interfered with the judicial process, but sentiment had turned by the time of the Constitutional Convention. Panels in Vermont and Pennsylvania decried interference by the legislature with judicial decrees. This outcry "triumphed among the Framers," who decided to establish an independent judiciary. Decisions following ratification confirmed the view that the new Constitution forbade intrusion by the political branches into the final judgments of courts.

The new Constitution's separation of powers forbade subjecting the district court's power to enter a binding decree to the discretionary actions of a coordinate branch (let alone the discretion of a foreign sovereign), as *Hayburn's Case* famously illustrated. There, a statute rendered the judiciary's identification of veterans who qualified for pensions subject to a final decision by the Secretary of War and dependent on subsequent appropriations by Congress. 2 U.S. (2 Dall.) 409 (1792). A judicial decision whether a petitioner was entitled to a pension would not be self-executing, but subject to revision by the political branches. Justices Iredell and Sitgreaves rejected this scheme: "no decision of any court of the United States can, under any circumstances, in our opinion, agreeable to the constitution, be liable to a revision, or even suspension . . . ." *Hayburn's Case*, 2 U.S. (2 Dall.) at 410 n. (statement of Iredell, J., and Sitgreaves, J.).

This idea was developed in *Gordon*, where a statute had established a Court of Claims empowered to issue judgments whose payment would depend on appropriations by the Treasury. This Court held the statute unconstitutional, for the capacity to direct a remedy is "an essential part of every judgment passed by a court exercising judicial power." 117 U.S. at 702. The statute's delegation of remedy power to the Executive intolerably burdened the separation of powers. *Id.* at 699, 702.[8] Thus *Gordon* held that Article III power is nondelegable. "[T]he 'judicial Power . . . can no more

[8] In *Gordon*, of course, it was open to the Court to strike the statute as unconstitutional under Article III. It was not open, however, to the court of appeals to strike the *habeas* remedy, in light of the Suspension Clause. Art. I, cl. 9.

be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power." *United States v. Nixon*, 418 U.S. 683, 704 (1974) (citing THE FEDERALIST No. 47, at 313 (Alexander Hamilton) (S. Mittell ed. 1938)).

In *Plaut*, judgments adverse to plaintiffs had been rendered under what all conceded was a confusing legal regime. The Court acknowledged that Congress might have had a benign intention in allowing re-opening of those judgments. But the Separation of Powers could not abide intrusion on the exclusive domain of courts, and the rendition of final judgments forms part of that domain. The Framers crafted Article III with "an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy." *Plaut*, 514 U.S. at 218-19 (emphasis in original); *Miller v. French*, 530 U.S. 327, 344 (2000) (judicial power is one to render dispositive judgments).

2. The decisions below improperly delegate the judicial power to the Executive.

The *Kiyemba* decisions defy this basic principle. Hearkening back to the populism of the pre-ratification period, they abandon to the political branches all question of remedy in cases where the Executive had the foresight to incarcerate its unpopular alien prisoners offshore. In *Kiyemba I*, the panel majority concluded that the Judiciary had no "power to require anything more" than the jailer's representations that it was continuing efforts to find a foreign country willing to admit Petitioners. Pet. App. 32a. By reinstating this de-

cision, *Kiyemba III* reaffirmed the circuit's view that only non-judicial relief is available to the party prevailing in a judicial proceeding. That relief is quintessentially *political* in nature—the exercise of diplomatic efforts by a popularly elected Executive, and of discretion by foreign sovereigns. An Article III court has no means of directing international politics, and *Kiyemba*'s exhortation to diplomacy leaves all aliens held in off-shore jails—and the Article III courts—dependent for relief on the political branches.

Our tripartite Constitution assigns distinct roles to the branches. The Judiciary has the power conclusively to decide cases or controversies, and in that context to "say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), while the Executive must "take Care" that the law is followed, U.S. CONST. art. II, § 3. Thus the Executive must follow the law as declared by the Judiciary (here, in *Boumediene*) through the resolution of cases or controversies. The court of appeals turned that structural principle on its head. *Kiyemba* renders the Judiciary merely an advisor to the Executive, destroying the essence of judicial independence. By transferring remedial power to the Executive and barring the district courts from issuing anything other than exhortations to diplomacy, *Kiyemba* reconfigured the Judiciary into an arm of the Executive. Thus *Kiyemba* vindicates not the separation of powers, but their conflation in the Executive branch. Its compromise of the independence of the Judiciary warrants *certiorari* review. *See Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 74 (1992) (judicial remedies historically necessary to, among other things, "ensure an independent Judiciary").

3. Petitioners did not lose their right to a judicial remedy by declining to volunteer for temporary relocation.

Petitioners pause to address the elephant in the room. Bearing no responsibility for their imprisonment, Petitioners declined to volunteer for temporary relocation to Palau. The government will argue, *inter alia*, that this fact renders judicial relief unnecessary under *Boumediene*'s holding.

The argument does not withstand scrutiny. A prisoner has no obligation to volunteer for transportation to a particular island. His failure to do so does not deprive him of the *habeas* remedy from the court having jurisdiction of his case. In centuries of *habeas* jurisprudence, no decision ever forced the prisoner to trade his remedy—release—for foreign exile.[9] And no rule let the jailer avoid his obligation—again, release—by procuring the offer. Petitioners are aware of no decision that a prisoner "held the keys to the jailhouse" because he had declined such an exile.

There is no doubt that release is the remedy. *Boumediene* held that the judicial officer has the power to direct release, where necessary. 553 U.S. at 787. The centrality of release power is well established. *See, e.g., In re Medley*, 134 U.S. 160, 173 (1890) ("under the writ of *habeas corpus* we cannot do anything else than discharge the prisoner from wrongful confinement"); *Ex Parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1830) (Marshall, C.J.); *Ex Parte Bollman*, 8 U.S. (4 Cranch)

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[9] The *Habeas Corpus* Act of 1679 was enacted, in part, to prevent exile to just such "islands beyond the seas." 31 Car. 2, c. 2 (Eng.).

75, 136 (1807) (a *habeas* court that finds imprisonment unlawful "can only direct [the prisoner] to be discharged").

For *habeas* winners at Guantanamo, three avenues are consistent with *Boumediene*. First, the parties may agree upon a home or third country that will receive the petitioner. In that case, the parties would jointly request that the court not enter an order of U.S. release. For example, many of the remaining detainees are Yemenis who wish to return home. While a district judge cannot order Yemen to receive a prevailing *habeas* petitioner, he can withhold the grant of a remedial order while the parties effect a consensual return to Yemen. The same might be true of a third country (such as Bermuda or Switzerland, both of which extended offers that were promptly accepted through the ready cooperation of the prisoners, the government, and counsel).

A second avenue lies open to the Executive through exercise of its considerable authority to remove the petitioner to a third country under Title 8 of the U.S. Code. This would be fully consistent with *Boumediene* and, absent a violation of the Convention Against Torture or some other impediment, the exercise of this statutory power, upon notice to the Court, would not interfere with an exercise of the judicial power.

The third avenue becomes necessary where neither of the first two is immediately feasible. The petitioner is released from the courthouse under conditions sufficient to secure his reappearance, *see* Fed. R. App. P. 23(c), becomes an undocumented alien, and the government retains all of its removal powers.

In short, while the executive has considerable statutory power under the immigration laws, by main force, to *cause* the transportation of an undocumented alien by forcibly removing him, *see* 8 U.S.C. § 1001, *et seq.*, this case involves no exercise of that power, and the district court never sought to limit its exercise. This case involves only executive imprisonment. Judicial release power remains necessary where, as here, an end to indefinite executive detention has not been procured by agreement (as in a case of homecoming to a safe homeland), or main force (as in the case of an exercise of removal power under Title 8). Because the prisoner remains imprisoned, and nothing in law requires him to volunteer for exile, a judicial release order is necessary.[10]

To be sure, the Separation of Powers demands that release power, like all judicial powers, be exercised with restraint, having due practical regard for the Executive's undoubted power to remove aliens without visas. But because the Executive here did not exercise its removal powers, and was not restrained from doing so, and because there is no power in *habeas* to punish the prisoner who does not *volunteer* for exile, a judicial order of release, which was necessary when the district court entered it, remains necessary today.

Even if, *arguendo*, a court might withhold the release remedy because of a prisoner's failure to volunteer for a particular resettlement, Petitioners were de-

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[10] The mischief of *Kiyemba I* and *III* is that, by ruling broadly, the decisions eliminate judicial remedy even in cases where there is no option for release of any kind—as was true here, when this case was before the district court.

nied the ability to establish a record as to what, if anything, had been offered and rejected—facts that a district court would need in order to determine whether an order directing release was "necessary" under *Boumediene*. 553 U.S. at 787.

B. The Decision Below Conflicts With *Boumediene* And Violates The Suspension Clause.

Kiyemba I was unfaithful to *Boumediene*. The majority left the district court powerless to relieve unlawful imprisonment, even where the Executive brought the prisoners to our threshold, and imprisons them there without legal justification. This profound conflict with *Boumediene* warrants *certiorari* review.[11]

1. *Kiyemba* ignores *Boumediene*'s holding.

Boumediene ruled in plain terms that district judges must have power to issue orders for release. 553 U.S. at 787. *Kiyemba I* held that they have no such power. Pet. App. 32a. No sovereign except our own is subject to the orders of our judiciary, and if our own sovereign is immune, there is no judicial remedy in any case. Under *Kiyemba I* and *Kiyemba III*, there is no "release order" a district judge can issue in any Guantánamo case.

This was error, and not merely in its contradiction of the *Boumediene* holding. A *habeas* court has always

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[11] *Cooper v. Aaron*, 358 U.S. 1 (1958), reaffirmed that lower courts are bound to adhere faithfully to the Court's rulings. Unwilling to abide by the clear command of *Boumediene*, the court of appeals has, as discussed *infra* at section E.2., caused a *habeas* logjam in the district court. For the reasons articulated in *Cooper*, the Court's intervention is needed here.

been duty-bound to impose a remedy. *See Harris v. Nelson*, 394 U.S. 286, 292 (1969); *Bowen v. Johnston*, 306 U.S. 19, 26 (1939).

To be sure, a foreign sovereign generally and safely may accept its own citizens, and in some cases other diplomatic arrangements may be reached. But without the fallback of judicial power to order release, even imprisonments that the Executive concedes have no legal justification will continue at the discretion of the Executive, while the *habeas* court will be reduced to irrelevance, required to grant control over relief to the very party that failed to meet its burden and lost the case.

2. The *Kiyemba* holdings rest on an erroneous understanding of the Suspension Clause.

In *Kiyemba I*, the panel majority reasoned that *habeas* affords no right to release unless the prisoner demonstrates an affirmative personal right to that remedy. Pet. App. 25a. This ruling reflects a misunderstanding of the *habeas corpus* privilege. The Great Writ was "an integral part of our common-law heritage" at the time of the Founding, receiving explicit recognition in the Suspension Clause. *Rasul v. Bush*, 542 U.S. 466, 473-74 (2004) (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 485 (1973) (internal quotation marks omitted)); *Boumediene*, 553 U.S. at 746. Among its core propositions is that the jailer has the burden to demonstrate positive law authorizing imprisonment; where he cannot do so, the court must order release, and the jailer must comply. *Habeas* cases were framed not in terms of the petitioner's rights but of the jailer's power. "The question is," wrote Chief Justice Marshall, "what au-

thority has the jailor to detain him?" *Ex Parte Burford*, 7 U.S. (3 Cranch) 448, 452 (1806).

Thus was the writ understood in the centuries before the Founding, *see, e.g.*, Paul D. Halliday, G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 598-600 (2008), and in this Court's decisions, *see, e.g.*, *Boumediene*, 553 U.S. at 745 ("The Clause [affirms] the duty and authority of the Judiciary to call the jailer to account."); *Wingo v. Wedding*, 418 U.S. 461, 468 (1974) ("if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release"); *Preiser*, 411 U.S. at 484 (1973) ("traditional function of the writ" to "secure release from illegal custody").

Common-law *habeas*, as it was known in England and colonial America before the Founding, and as protected by the Suspension Clause, did not depend on "constitutional rights" which, of course, did not exist. *Boumediene*, 553 U.S. at 739 (Suspension Clause predates the Bill of Rights); Jared A. Goldstein, *Habeas Without Rights*, 2007 WIS. L. REV. 1165, 1182 (2007) (the concept of individual legal rights was "in its infancy"). The "right" guaranteed by the Great Writ and the Suspension Clause is the "right" to call the Executive to account and obtain a judicial remedy where the Executive cannot demonstrate a legal basis for the imprisonment. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND *133 (liberty is a "natural inherent right" which ought not "be abridged in any case without the special permission of law"); *Boumediene*, 553 U.S. at 739-45. The panel majority's inversion of the burdens imposed by the Great

Writ guaranteed by the Suspension Clause is error that merits *certiorari* review.

C. Construing Any Statute To Preclude The Judicial Remedy Of Release Would Violate The Suspension Clause.

1. *Kiyemba*'s holding that immigration law bars relief is incorrect.

Petitioners, the majority said, were "alien[s] who seek[] admission to this country." Pet. App. 27a. This recharacterization permitted it to invoke the principle that the political branches have discretion over immigration matters, citing decisions in which courts defer to immigration policy choices made by Congress and the Executive's enforcement of those policies. *Id.* at 23a-25a. But this analysis is incorrect.

First, Petitioners never applied for immigration status. They did not bring themselves to the border. They bear no responsibility for their dilemma. Unlike the decisions upon which the court of appeals relied, this appeal involves no case or controversy concerning the immigration laws. That the immigration laws give the Executive discretion over the immigration status of Petitioners is beside the point—at issue here is imprisonment. Respondents never pointed in a *habeas* return to an immigration law that justifies their imprisonment at Guantánamo, and there is none. The district judge understood that his Release Order neither granted an immigration remedy nor limited the Executive's ability to impose one (such as, for example, deportation) once the men were released here.

Second, even if the immigration laws had been triggered, the Suspension Clause must trump the power of

the political branches in the Guantánamo cases, or *Boumediene* was no more than a suggestion. By design, the Suspension Clause and the *habeas* privilege it protects check the political branches, barring unlawful Executive detention and suspension of *habeas* absent a formal suspension of the writ under the conditions prescribed in the text of the Suspension Clause. *Boumediene*, 553 U.S. at 745. Petitioners are at Guantánamo only because the Executive took them there. So far as the Suspension Clause is concerned, immigration laws are no different than other acts of Congress. Interpreting the immigration laws or the immigration powers of the political branches to bar a remedy in *habeas* where no law authorizes executive detention would effect the same suspension of the writ that this Court found unconstitutional in invalidating the Military Commissions Act in *Boumediene*. *See also INS v. St. Cyr*, 533 U.S. 289, 300-05 (2001); *INS v. Chadha*, 462 U.S. 919, 943 (1983).

Third, under this Court's precedents, the right to release—even when exercised by concededly undocumented aliens—has trumped the powers of the political branches over immigration, even as to statutory detention powers related to a legitimate interest in deportation. *Zadvydas*, 533 U.S. at 689. In *Clark v. Martinez*, 543 U.S. 371, 386-87 (2005), the Court extended this proposition to aliens who, like Petitioners, had never made an entry under the immigration laws (and who, unlike Petitioners, were adjudicated criminals). *Martinez* permitted only a presumptive six-month detention beyond the 90 days for aliens inadmissible under section 1182. *See* 543 U.S. at 386; 8 U.S.C. § 1226a(a)(6) ("[l]imitation on indefinite detention").

Once removal is no longer "reasonably foreseeable," as happened years ago in these cases, the Executive must release the alien. *Martinez*, 543 U.S. at 377-78; *Zadvydas*, 533 U.S. at 701.

Martinez rejected the same statutory, security, and separation-of-powers theories the Executive raised here and the *Kiyemba* majority adopted. 543 U.S. at 385-86. In both cases, the Court ordered the release into the United States of aliens who had no legal entitlement to be here, based on constitutional concerns. The central constitutional principle is that no statute can be read to permit indefinite imprisonment—even if it deals with alien *criminal*s and on its face authorizes their indefinite imprisonment. This rule applies in cases—like *Martinez* itself—where there actually is a record of prior criminal activity or other risk factors.[12]

Release in the United States of an alien without immigration status may pose logistical difficulties, but the problem is entirely of the Executive's making, and the Executive must bear the burden. *See Boumediene*, 553 U.S. at 795 ("the costs of delay can no longer be borne by those who are held in custody"); *Youngstown*

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[12] Courts applying *Martinez* have reached the same result. *See, e.g.*, *Tran v. Mukasey*, 515 F.3d 478, 485 (5th Cir. 2008) (public-safety concerns do not justify continued detention); *Nadarajah v. Gonzales*, 443 F.3d 1069, 1083-84 (9th Cir. 2006) (alien released from five-year detention despite security-risk argument); *Hernandez-Carrera v. Carlson*, 546 F. Supp. 2d 1185, 1190-91 (D. Kan. 2008) (further detention of mentally ill aliens with history of violence not permitted); *see also Hussain v. Mukasey*, 518 F.3d 534, 539 (7th Cir. 2008) (alien found to have engaged in terrorist activities under 8 U.S.C. § 1182 releasable in six months). Unlike the aliens in these cases, Petitioners are not adjudicated criminals and have no connection to any criminal or terrorist activity.

Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 613 (1952) (Frankfurter, J., concurring) ("No doubt a government with distributed authority, subject to be challenged in the courts of law, at least long enough to consider and adjudicate the challenge, labors under restrictions from which other governments are free. It has not been our tradition to envy such governments. In any event our government was designed to have such restrictions. The price was deemed not too high in view of the safeguards which these restrictions afford.").

2. Post-*hoc* legislation cannot bar relief.

Kiyemba III also relied on statutes enacted, after Judge Urbina ruled, with the evident purpose of legislatively denying the remedy he imposed. A series of 2009 and 2010 appropriations bills prohibit the expenditure of funds to bring any Guantánamo detainee into the U.S. If read to apply to Petitioners, however, these bills are void because Congress did not invoke its suspension power, whereby it may suspend *habeas* only upon grounds of a rebellion or invasion. U.S. CONST. art. I, § 9; *Boumediene*, 553 U.S. at 777-78, 792 (voiding MCA § 7).

The bills' sponsors said they were responding to reports that the President was about to release Uighurs in the United States, demonstrating their motive to deprive these very Petitioners of the remedy in *habeas* they had already obtained from the district court. Each bill defines the burdened class only by alien status and either "location" or "detention" at Guantánamo on a certain day, *see, e.g.*, The Supplemental Appropriations Act, 2009, Pub. L. No. 111-32, 123 Stat. 1859, June 24, 2009; The Department

of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, 123 Stat. 2142, Oct. 28, 2009, without regard to conduct or previous adjudication. None provides any remedy at all. *Compare Boumediene*, 553 U.S. at 788 (DTA provided remedial provisions that five justices thought inadequate).

"The Legislature's . . . responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." *St. Cyr*, 533 U.S. at 314. At such times, unpopular persons may be transformed on the Senate floor to "hardened killers bent on the destruction of the United States,"[13] and as so transformed, consigned to an island prison. This is the very abuse that the Suspension Clause was designed to eliminate. *Id.* By confining Congress's suspension power to cases of rebellion or invasion, the Constitution largely removes *habeas* from democratic control.[14]

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[13]55 Cong. Rec. S5653-4 (daily ed. May 20, 2009) (statement of Sen. Thune regarding Uighurs now living peacefully in Bermuda, Palau and Switzerland).

[14] The bills would also effect unlawful bills of attainder if construed to bar release to Petitioners. "Bills of attainder" are legislatively imposed punishments of individuals, whether identified by name or in some other manner. Art. I, § 9, cl.3; *see United States v. O'Brien*, 391 U.S. 367, 383 n.30 (1968); *United States v. Brown*, 381 U.S. 437, 462 (1965); *United States v. Lovett*, 328 U.S. 303, 317 (1946). The clause reflects the framers distaste for the runaway populism of the colonial period, which saw rampant legislative intrusion on the judicial function. *See generally, Plaut*, 514 U.S. at 219-25. The clause is an important structural limitation on congressional power. *Chadha*, 462 U.S. at 962 (clause "'a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature' [reflecting] the Framers' concern that trial by a legislature lacks the safeguards necessary to

Because Congress may not suspend the writ in the absence of finding a rebellion or an invasion, these bills cannot bar *habeas* relief.

D. Petitioners' Imprisonment Violates The Fifth Amendment's Due Process Clause.

The *Kiyemba I* majority held that "the due process clause does not apply to aliens without property or presence in the sovereign territory of the United States," citing its pre-*Boumediene* decisions, and this Court's decisions in *Verdugo-Urquidez*, 494 U.S. at 269, and *Eisentrager*, 339 U.S. at 783-84. Pet. App.9a. This was error.

Rejecting bright-line geography in concurring in *Verdugo-Urquidez*, Justice Kennedy identified a functional approach to extraterritorial application of the Constitution. The test was whether the "conditions and considerations" of the application were consistent with the nature of the territory and the case. *See, e.g.*, *Verdugo-Urquidez*, 494 U.S. at 277-78 (Kennedy, J., concurring); *see also Reid v. Covert*, 354 U.S. 1, 74 (1957) (Harlan, J. concurring). This approach took hold in *Rasul* and again in *Boumediene*, where this Court applied a functional test to determine that the Suspension Clause is effective in Guantánamo and re-

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prevent the abuse of power"). Congress may create punishments of general applicability, and it may legislate in ways that, while not punishing, nevertheless burden a class as small as one. *See Nixon v. Administrator of Gen. Serv.*, 433 U.S. 425, 474-75 (1977). But Congress may not target specific individuals with punishments. *Ex parte Garland*, 71 U.S. 333, 377 (1867). Read as the government wishes to read them, the new bills would imprison indefinitely a specific list of persons, present at Guantánamo on a certain day.

strains the Executive's confinement of prisoners. 553 U.S. at 769-71. Neither their citizenship nor their location places Petitioners entirely beyond the reach of the Constitution. *Id.* at 770-71. Thus this Court has twice rejected, in *Rasul* and in *Boumediene*, bright-line geography rationales of the court of appeals, holding instead that a functional test applies. Without explanation, the panel majority reapplied the geography test for a third time in *Kiyemba*.

Boumediene's holding addresses only the Suspension Clause. But application of its functional test leads inevitably to recognition of a due process liberty right for Guantánamo detainees that affords effective relief from indefinite Executive imprisonment, where the government transports the prisoner to Guantánamo, unlawfully confines him there, and then pleads his want of a visa. Nothing about Guantánamo makes enforcement of this narrow due process liberty right "impracticable and anomalous." *Boumediene*, 553 U.S. at 759. No other sovereign asserts a conflicting authority, and the reach of the remedy will never exceed the unilateral grasp of the Executive. The right claimed lies at the core of the Due Process Clause—the right to be free from unlawful government detention. *See, e.g.*, *Zadvydas*, 533 U.S. at 690; *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). Accordingly, the Due Process Clause of the Fifth Amendment is sufficient to accord to civilians like Petitioners a right not to be detained indefinitely without authorization.

E. The Surpassing Importance Of The Questions Presented Merits The Court's Immediate Intervention.

1. No other court of appeals can review the questions presented here.

Absent the Court's intervention, the court of appeals will have settled the law of judicial remedy in offshore *habeas* cases. *See Gherebi v. Bush*, 374 F.3d 727, 739 (9th Cir. 2004) (transferring *habeas* petition brought by Guantánamo detainee to the District of Columbia). After *Gherebi*, every Guantánamo *habeas* petition has been filed in the District of Columbia. *Boumediene* even suggested that the District of Columbia is the proper venue for detainee *habeas* petitions, particularly to ease the Executive's administrative burden. 553 U.S. at 796. No other court of appeals can review this significant area of the law.[15]

2. *Kiyemba* has had intolerable practical effects on the administration of justice.

Political, rather than judicial, relief now dominates the district court's review of Guantánamo cases. A post-*Kiyemba habeas* court can ask the Executive jailer only to undertake diplomacy, allowing the Executive to nullify a judicial ruling—predicated on *Boumediene*—that there is no basis for the detention. *See, e.g.*, *Mohammed v. Obama*, 704 F. Supp. 2d 1, 32 (D.D.C. 2009); *Basardh v. Obama*, 62 F. Supp. 2d 30, 35-36 (D.D.C. 2009) (same); *Al-Adahi v. Obama*, No. 05-280,

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[15] A resourceful and determined lower court can render even a landmark case like *Boumediene* "only a promise to the ear to be broken to the hope." *See Edwards v. California*, 314 U.S. 160, 186 (1941) (Jackson, J., concurring).

2009 WL 2584685, at *16 (D.D.C. Aug. 21, 2009) (same); *Ahmed v. Obama*, 613 F. Supp. 2d 51, 66 (D.D.C. 2009) (same). The Executive has also argued in some cases that *habeas* proceedings brought by prisoners approved for transfer should be stayed before the prisoner has even received a hearing because, after *Kiyemba*, no court can relieve a Guantánamo detainee's imprisonment. Resp'ts' Mem. in Support of a Stay of Proceedings Involving Pet'rs Who Were Previously Approved for Transfer, at 4-5 [dkt. no. 1058], *Al Sanani v. Obama*, No. 05-02386 (D.D.C. Mar. 9, 2009) ("Because [*Kiyemba*] forecloses the possibility of a court order directing the Government to transfer a detainee into the United States, in many cases there will be no relief as to the fact of detention available beyond already mandated diplomatic efforts to find an appropriate receiving country . . . . [T]he Executive's decision approving a detainee for transfer may render the detainee's request for *habeas* relief, *i.e.*, release, moot."); *see also* Sealed Supplemental Appendix (stay orders).

Thus this case profoundly affects not only Petitioners, but all other Guantánamo prisoners whose *habeas* cases are now pending, *see Mass. Trs. of E. Gas & Fuel Assocs. v. United States*, 377 U.S. 235, 237 (1964) (*certiorari* granted in part because of number of impacted cases), and all prisoners in offshore Executive prisons now and in the future. *Cf. also* Pet. for a Writ of Cert., *Ameziane v. Obama*, No. 10-447 (S. Ct. June 28, 2010) (filed under seal).

The ruling also gives the Executive license to withhold freedom after losing cases. Khaled Al Mutairi, a Kuwaiti who wished to return home, prevailed in *ha-*

beas. *Al Mutairi v. United States*, 644 F. Supp. 2d 78, 95 (D.D.C. 2009). More than two months later, he remained in the prison. Kuwaiti officials reported that the sticking point was U.S. insistence on detention restrictions *in Kuwait after his transfer*. *See* Decl. of David J. Cynamon, ¶¶ 8-9 [dkt. no. 661-2], *Al Rabiah v. United States*, No. 02-00828 (D.D.C. Oct. 13, 2009). Al Mutairi was eventually released, but only after vigorous post-*habeas* litigation efforts by his counsel. *Id*. at ¶ 10; *see also* Pet. for Writ of Cert., *Mohammed v. Obama*, No. 10-746 (S. Ct. Nov. 5, 2010) (petitioner prevailed in *habeas*, the government appealed and, on its motion, the court of appeals held the appeal in abeyance, denying petitioner *habeas* relief).[16]

Following the decision below, the Executive assumed effective control of the judicial function in other ways. In some cases, when a hearing was imminent or a government filing due, the Executive "cleared the prisoner for release," and then obtained a stay. For example, Umar Abdulayev had prosecuted his *habeas* claim, *see* Br. of Appellant at 12-13, *Abdulayev v. Obama*, No. 09-5274 (D.C. Cir. Nov. 10, 2009), and

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[16] It is also the official policy of the Executive not to return detainees to Yemen. *See* Charlie Savage, *Rulings Raise Doubts on Policy On Transfer Of Yemenis*, N.Y. TIMES, Jul. 9, 2010, *available at* http://query.nytimes.com/gst/fullpage.html?res=9B0DEEDE1F39F93AA35754C0A9669D8B63&scp=1&sq=odaini&st=nyt; Peter Finn, *Return of Yemeni detainees at Guantanamo Bay is suspended*, WASH. POST, Jan. 5, 2010, *available at http://www.washingtonpost.com/wp-dyn/content/article/2010/01/05/AR2010010502850.html?hpid=topnews*. Setting this policy is within the Executive's power, but under *Kiyemba* it allows the Executive to render *habeas* review academic.

with a decision looming, the Executive cleared him for release and obtained a stay, *id.* at 13, promising to pursue a diplomatic transfer. *See also* App. to *Abdulayev* Br. of Appellant at A.76-A.77. Judicial review was avoided, *Abdulayev* Br. of Appellant at 14, and a stay remained in place for ten months. Abdulayev remains in Guantánamo, and it is not clear what relief, if any, he can obtain. *See also* Order [dkt. No. 1621], *Al Sanani v. Obama*, No. 05-02386 (D.D.C. Apr. 1, 2010) (Abdul Aziz Naji's case was stayed over his objection and he was later forcibly transferred to Algeria where his ultimate fate remains uncertain).

The effect of *Kiyemba I* is that offshore *habeas* petitioners are no closer to the courthouse door than before *Boumediene*.

3. The Executive's policy objective masks the long-term consequence of *Kiyemba*.

Within days of his inauguration, President Obama announced a policy objective to close the Guantánamo prison. He has devoted diplomatic energy to the resettlement of prisoners, but in pursuit of his policy choices, not at the behest of the Judiciary. This is a political coincidence, and a fragile one: another President might have a different objective.

The congruence of executive policy with removal of prisoners from Guantánamo masks the constitutional wound inflicted by *Kiyemba I* and *III*. Left unreviewed, these decisions will survive the current political moment and Guantánamo itself to stand as precedent for future executives, whose policy objectives may be inconsistent with grants of judicial relief in discrete cases and controversies. Absent the Court's interven-

tion, courts will have jurisdiction to opine on status, but not to decide cases. The decision below will provide a future executive resistant to judicial review with a nearly absolute and unreviewable detention power, easily activated with an offshore flight plan. All relief will be located entirely and completely with the jailer himself.

4. *Kiyemba* intrudes on the *habeas* privilege in a way that continues to frustrate review.

Delay is an inevitable consequence of appellate review. But *habeas* cases are *sui generis*: delay is the *substantive* problem. The proposition that six months represents the presumptive limit on indefinite executive detention, *see Martinez*, 543 U.S. at 386, is a false one, if the Executive may stretch months to years in the appellate courts, and then moot the case. The last release illustrates best. After eight years of imprisonment, Arkin Mahmud, formerly a petitioner in this case, received an offer from Switzerland two days before the government's merits brief was due in this Court in February, 2010. He had lived through more than eight years of unlawful executive detention.

Petitioners received an offer regarded by the government as appropriate—but only under threat of *certiorari* review here, and only seven years after the Executive imprisoned them in the first place.

The Executive has considerable diplomatic powers. When it focuses them on the detainee who has nearly reached the cusp of relief in this Court, it can moot cases, even at the eleventh hour. This tactic—imprison and delay for years, moot the case at the brink of appellate review—stretches indefinite detention far be-

yond the six-month presumptions of *Zadvydas* and *Clark*. If *Kiyemba* cannot be reviewed until a detainee arrives in this Court who has never been offered even transportation to a remote and friendless exile, then its surrender of the judicial power may well become permanent.

CONCLUSION

The Court should grant the petition for a writ of *certiorari*.

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